

# NCSL Pretrial Convening

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# APPR

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**Advancing Pretrial Policy and Research (APPR)** seeks to achieve fair, just, effective pretrial practices, every day, nationwide.

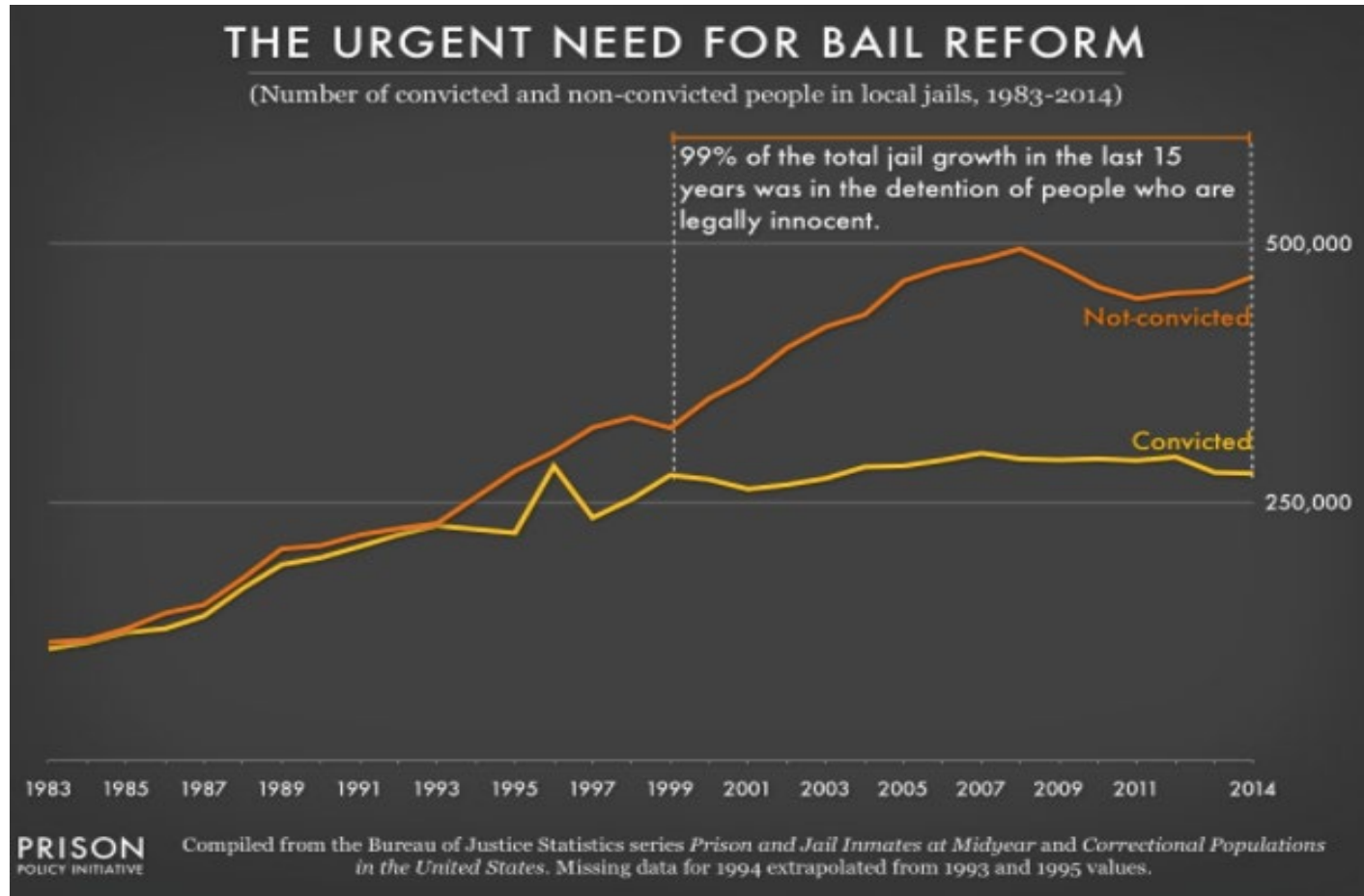
# Why Focus on Pretrial?

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**“Pretrial decisions  
determine mostly  
everything.”**

**~ Prof. Caleb Foote, 1956**

# National Jail Population Growth



# The \$14 Billion Question

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*Are we detaining the right people?*

# The \$14 Billion Answer

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**No.**

# Agenda

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**I. Who *Is* Being Detained Before Trial?**

II. Who *Should* Be Detained Before Trial?

III. Why Are We Detaining the Wrong People?

IV. What Would a Better System Look Like?

V. How Does Change Happen?

# Current System: Dual System Errors

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- Jail population study—New Jersey (2013):
  - ✓ 40% of defendants were in jail because they couldn't make secured money bail
  - ✓ 30% of this number were held on less than \$2,500
- Jail population study—Harris County, Texas (2015)
  - ✓ 3,120 individuals annually cannot make secured money bail of \$500 or less
- Typical of jail studies nationally
- Those with money can buy their way out, regardless of risk



# Current System: Public Safety

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Status quo does not effectively protect the public

- For those with access to money, financial conditions are no obstacle to release—regardless of public safety
- In one large jurisdiction, of the top 1% most dangerous defendants, half were released
  - ✓ And they were responsible for **over 100 violent crimes** every year

# Current System: Public Safety

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Unnecessary detention is actually correlated with an *increase* in crime

➤ 2022 study out of Kentucky:

- ✓ Pretrial detention—even for short periods—is associated with higher rates of rearrest
- ✓ Pretrial detention has no impact on FTAs

# Current System: Fairness

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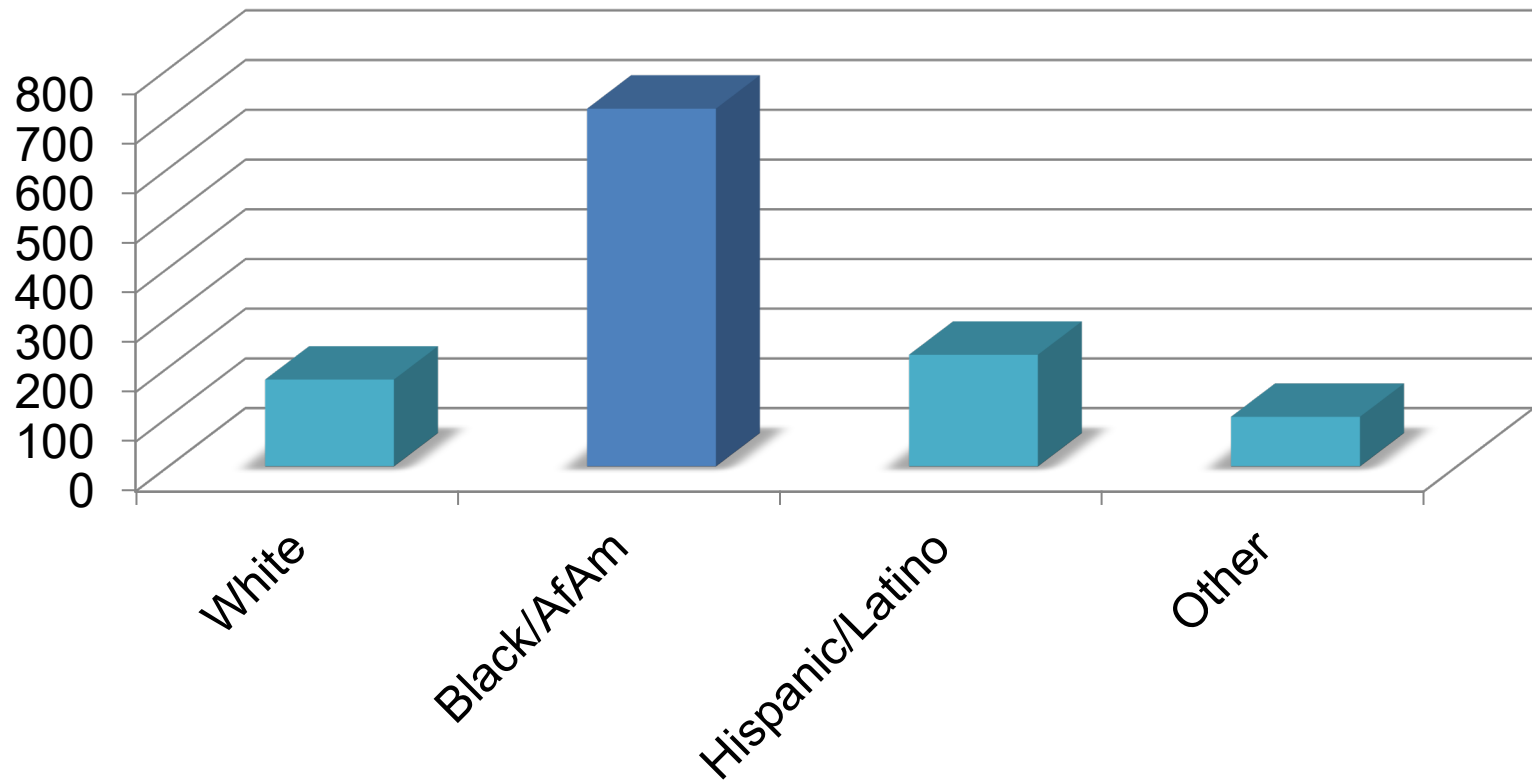
Pretrial incarceration leads to:

- Loss of job
- Destabilization or loss of housing
- Undermining of family ties—e.g., loss of custody
- Loss of educational opportunities and other support services

It also makes it more difficult to prepare a defense—and increases pressure on defendants to plead guilty

# Current System: Fairness

## Detention Rates by Race (per 100k)



# Current System: Cost

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- U.S. counties spend nearly \$14 billion annually housing pretrial defendants
- But costs of pretrial detention do not end there. 2013 Kentucky study:
  - ✓ Detained individuals **3-4X more likely** to be sentenced to jail or prison than individuals released pending trial
  - ✓ Sentences are nearly **2-3X as long**
  - ✓ Largest effects for **low-risk** defendants
- Similar findings in studies before and since

# Agenda

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I. Who *Is* Being Detained Before Trial?

**II. Who *Should* Be Detained Before Trial?**

III. Why Are We Detaining the Wrong People?

IV. What Would a Better System Look Like?

V. How Does Change Happen?

# Who *Should* Be Detained?

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1. Only a **Small Minority** of Defendants Can Be Detained
2. When It's **Absolutely Necessary** to Reasonably Assure Lack of Flight and Public Safety
3. And Only When They've Received Significant **Procedural Safeguards**

# Who *Should* Be Detained?

## 1. Only a **Small Minority** of Defendants Can Be Detained

“In our society, liberty is the norm, and detention prior to trial or without trial is the carefully limited exception.”

~ Chief Justice William Rehnquist, *United States v. Salerno* (1987)

### **WHY?**

- CJ system holds people accountable for past—not future—acts
- Presumption of innocence



# Who *Should* Be Detained?

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## 2. **Absolutely Necessary** to Prevent Flight and Protect Public Safety

- Physical liberty is the most foundational form of **freedom**
- Preventive detention must be the **last resort**. It has only been upheld in situations where judges find that *no other condition or combination of conditions* will reasonably assure (1) lack of flight and (2) public safety
  - ✓ No other reasons—e.g., he needs to be “sent a message”—are allowed
- “Reasonable assurance” is not complete confidence—otherwise we would **detain everyone**

# Who *Should* Be Detained?

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## 3. Procedural Safeguards

- Representation of defendants
- Adversarial hearing
- High evidentiary standard (“clear and convincing evidence”) to demonstrate a specified risk and the need for detention
- Written findings of fact and justification of decision
- Right to appeal / review

# State Law: Pretrial Release and Detention

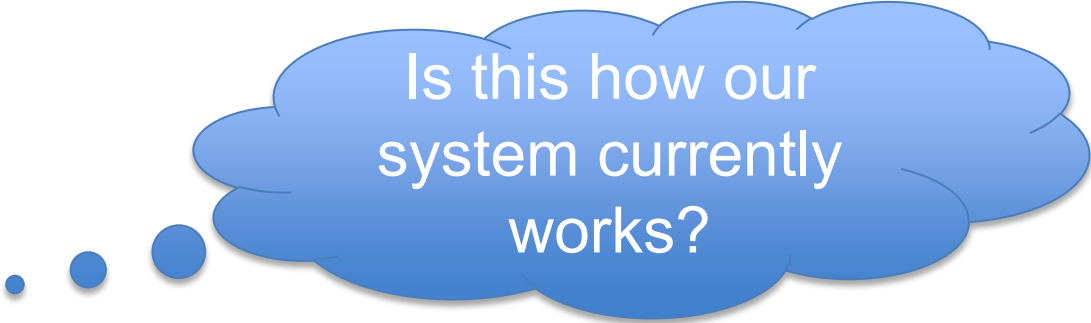
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- These federal constitutional guarantees establish **general baseline rules** to which courts in all states must adhere.
- But each state sets forth its **own specific criteria** for determining who is entitled to pretrial release, and who judges may consider detaining.

# Who *Should* Be Detained?

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1. Only a Small Minority of Defendants Can Be Detained
2. When It's Absolutely Necessary to Reasonably Assure Court Appearance and Public Safety
3. And Only When They've Received Significant Procedural Safeguards



Is this how our  
system currently  
works?

# Agenda

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I. Who *Is* Being Detained Before Trial?

II. Who *Should* Be Detained Before Trial?

**III. Why Are We Detaining the Wrong People?**

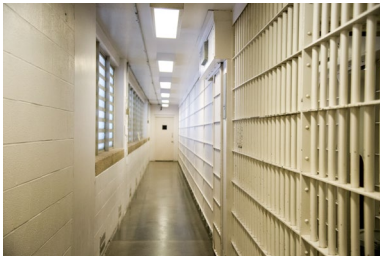
IV. What Would a Better System Look Like?

V. How Does Change Happen?

# Why Are the Wrong People Detained?

We are asking the *wrong* question

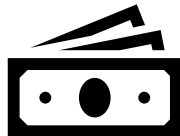
**Right question:** Should this person be detained?



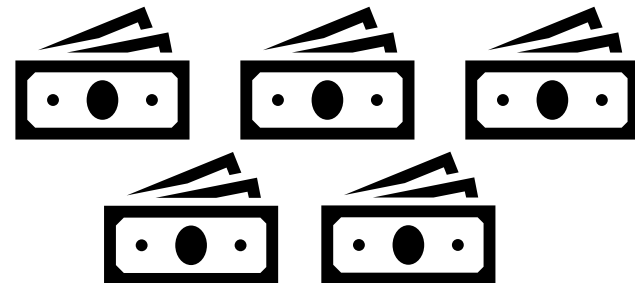
vs.



**Wrong question:** How much money should this person pay to get out of jail?



vs.

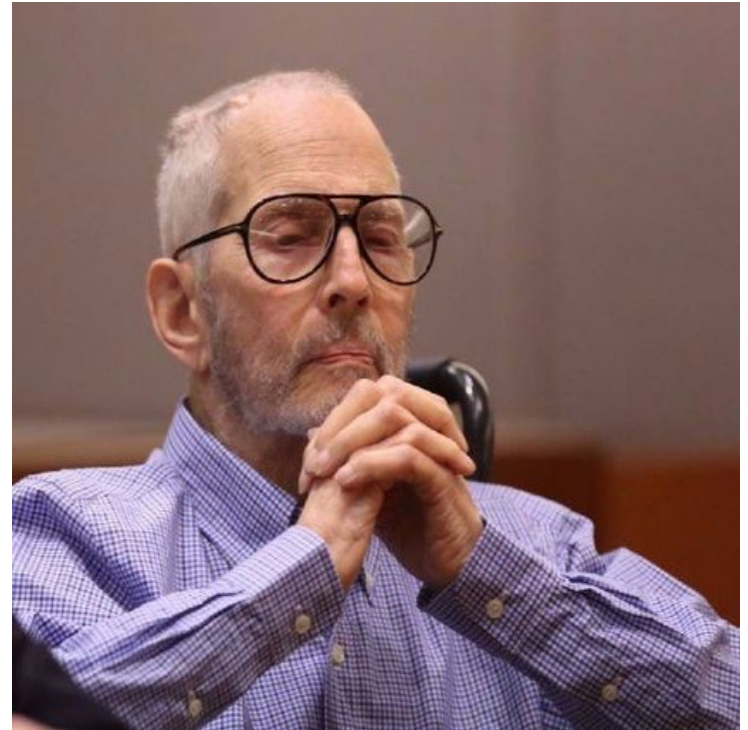


# Why Are the Wrong People Detained?

**Kalief Browder**



**Robert Durst**



# Agenda

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# A Better System

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1. Clear and *limited* criteria for detention
2. Judges—*not* money—decide release vs. detention
3. Defendants have robust procedural safeguards before being subject to detention
4. Conditions of release are individualized and are the least restrictive necessary

# A Better System

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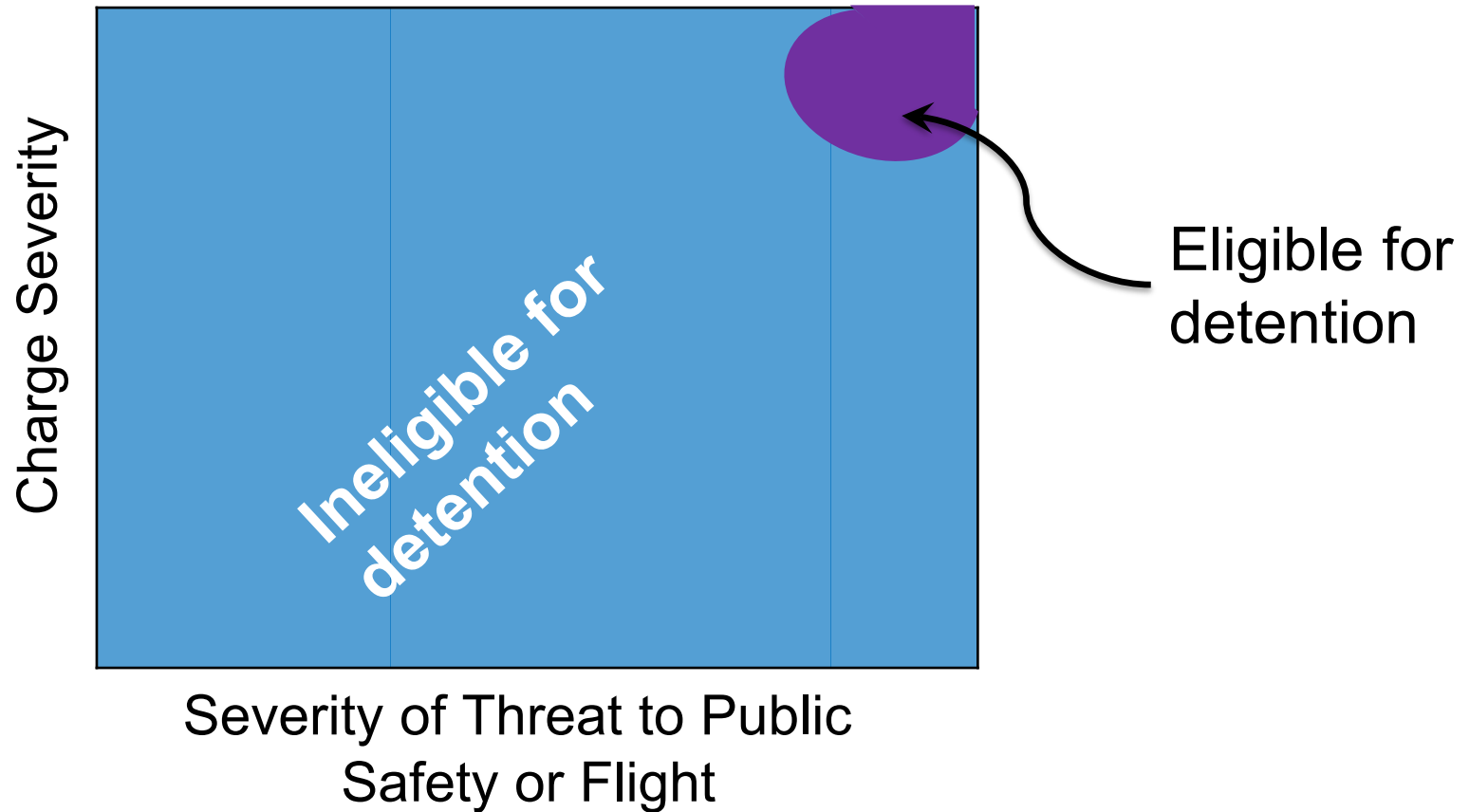
1. Clear and *limited* criteria for detention

What should be taken into account?

- Charge severity
- Likelihood of:
  - ✓ New criminal activity—especially violence
  - ✓ Flight

# A Better System

## 1. Clear and *limited* criteria for detention



# A Better System

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## 2. Judges—*not* money—decide release vs. detention

### ➤ Money bail can *never* be used to intentionally detain

- ✓ Using money to keep a defendant in jail is “contrary to the whole policy and philosophy of bail” as a tool of release. *Stack v. Boyle* (1951) (Jackson, J., concurring)
- ✓ This principle has been upheld by countless state and federal courts across the country

### ➤ A person’s ability to pay must be taken into account

### ➤ Unaffordable financial conditions will be subject to increased scrutiny

# A Better System

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2. Judges—*not* money—decide release vs. detention

➤ Research does not support the use of financial conditions

✓ Court appearance:

- *O'Donnell* (5th Cir., 2018): Surveying research, “release on secured financial conditions does not assure better rates of appearance”

✓ Public safety:

- **No study** shows that financial conditions reduce rearrest rates
- At least one federal court has found that it is “irrational” to impose money for purposes of public safety

# A Better System

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## 3. Procedural safeguards

- Representation of defendants
- Adversarial hearing
- High evidentiary standard (“clear and convincing evidence”) to demonstrate a specified risk and the need for detention
- Written findings of fact and justification of decision
- Right to appeal / review

# A Better System

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- For the vast majority of people who are legally entitled to pretrial release, how should a judge set conditions?

**Remember:** Most people will succeed on pretrial release without any conditions other than a promise to return to court and stay out of legal trouble.

# A Better System

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4. Conditions of release are individualized and the least restrictive necessary
  - People—when not convicted of a crime—should be released with the **least-restrictive conditions** necessary to provide reasonable assurance of court appearance and law-abiding behavior
  - This means making individual determinations about release conditions
    - ✓ People who are likely to succeed should be released with minimal conditions, if any
    - ✓ People who are less likely to succeed should receive appropriate conditions that mitigate their identified risk(s)



# A Better System

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4. Conditions of release are individualized and the least restrictive necessary

- This is where a pretrial assessment tool *may* be helpful
- But it should never dictate conditions on its own, nor should it be used for the detention decision

# Research: Pretrial Release Conditions

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- **Court date notification systems** can increase court appearance rates
- **Pretrial supervision** can improve court appearance but does not appear to reduce pretrial arrests
- There is no clear association between **pretrial location monitoring** (often called “EM”) and improved court-appearance or arrest-free rates
- There is no clear association between **pretrial drug testing** and improved court-appearance or arrest-free rates

# State Law: Pretrial Release Conditions

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- These legal principles and research findings establish certain **rules and best practices** for determining pretrial release conditions.
- But most states set forth their **own criteria and process** for deciding what, if any, pretrial release conditions are necessary.
- Local jurisdictions and individual judicial officers typically retain **substantial discretion** to set appropriate conditions in any given case

# A Better System

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Example—New Jersey's system-wide reform (2017)

- Amended constitution to permit preventive detention in some circumstances
- Made financial conditions available only when no other conditions would work
- Implemented pretrial assessment tool
- Implemented pretrial services
- Provided representation at first appearance
- Increased use of citations (partially informed by the PSA)

# A Better System

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Example—New Jersey's system-wide reform (2017)

- Pretrial jail population down 30%:
  - ✓ December 2016: 7,058 (pre-reform)
  - ✓ December 2018: 4,995
- Pretrial FTA and rearrest rates virtually unchanged (up 1-2%)
- Only 44 people had financial conditions set in first year
- If prosecutors don't move for detention, 81.3% of defendants released within 24 hours; 99.5% within 48 hours
- Greatest impacts on communities of color: 3,000 fewer black individuals in jail; 1,500 fewer whites; 1,300 fewer Hispanics

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# How Does Change Happen?

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## Litigation

- Significant cases launched in at least a dozen states, challenging current practices of pretrial detention on equal protection, due process, and state-law grounds
- Clear trends in decisions and settlements:
  - ✓ Reduction—or elimination—of bail schedules
  - ✓ Decrease in use of secured money bail
  - ✓ Reduction—or elimination—of money bail resulting in detention
  - ✓ Increased requirement of individualized hearings/findings
- Bottom line: Less money, less detention, more procedural protection

# The Current Path of Reform

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## Legislation

- Presumption of release on least restrictive conditions
- Disfavoring use of money
- Expansion of preventive detention
- Require/allow consideration of pretrial assessment tools
- Procedural safeguards
- Bottom line: Moving towards more *intentional* release/detention decisions



# How Does Change Happen?

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## Challenges for large-scale change

### ➤ An incredibly decentralized “system”

- ✓ Less than 10% of criminal proceedings are federal (more than 90% are state or local)
- ✓ State courts further broken down by county, district, or circuit
- ✓ And individual judges have broad discretion

### ➤ No single stakeholder with responsibility for results

### ➤ Organized—and deeply invested—opposition

### ➤ Localities need significant help with **implementation.**

# How Does Change Happen?

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But it is possible

- Growing appetite
- Growing knowledge base
- Expanded expertise among practitioners
- Interest from funders
- Initiative being taken by local jurisdictions